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Nos. 84-871, 84-889, 84-1054, and 84-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, APPELLANT
VS.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

CALIFORNIA AND PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, ET AL., PETITIONERS
VS.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

PUBLIC UTILITIES COMMISSION OF OHIO,
ET AL., PETITIONERS
VS.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER
VS.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

On Appeal and On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONERS IN No. 84-889

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QUESTION PRESENTED

Has the Federal Communications Commission exceeded its authority to regulate interstate communications under the Communications Act of 1934, 47 U.S.C. § 151, *et seq.* by preempting state authority to regulate the setting of intrastate depreciation charges and accounting classifications?

LIST OF PARTIES

People of the State of California and the Public Utilities Commission of the State of California

Virginia State Corporation Commission

Federal Communications Commission and United States of America

North American Telephone Company

Florida Public Service Commission

State of Michigan and Michigan Public Service Commission

Department of Public Utility Control of the State of Connecticut

National Association of Regulatory Utility Commissioners

Southern Pacific Communications Company

Public Service Commission of the District of Columbia

Public Utilities Commission of Ohio

Arkansas Public Service Commission

Kansas State Corporation Commission

GTE Service Corporation

Public Service Commission of Wyoming

Continental Telcom Inc.

Washington Utilities and Transportation Commission

United Telephone System, Inc.

Department of Public Service of the State of Minnesota

Arizona Corporation Commission

Cincinnati Bell Inc.

Citizens of the State of Florida, Office of Public Counsel

National Association of State Utility Consumer Advocates

Consumer Advocate of South Carolina

Office of Consumers' Counsel for the State of Ohio

Iowa State Commerce Commission

Public Service Commission of Wisconsin

Public Service Commission West Virginia

New York State Department of Public Service

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

The Mountain States Telephone and Telegraph Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

The Ohio Bell Telephone Company

Pacific Northwest Bell Telephone Company

The Pacific Telephone and Telegraph Company

Bell Telephone Company of Nevada

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

The Southern New England Telephone Company

Southwestern Bell Telephone Company

Wisconsin Telephone Company

Board of Public Utilities of New Jersey

Louisiana Public Service Commission

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No. 84-889

IN THE

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OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Appeal and On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONERS

OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, set forth in the Petitioners' Appendix in Case No. 84-889 (Pet. App.) at A-1, is reported at 737 F.2d 388. The Federal Communications Commission's December 22, 1982, Order preempting state prescription of depreciation charges and accounting classifications set forth in the Pet. App. at A-55, is reported at 92 F.C.C.2d 864. The FCC's April 27, 1982, Order finding that the states were not precluded from prescribing different accounting classifications and depreciation charges for intrastate ratemaking set forth in the Pet. App. at A-26, is reported at 89 F.C.C.2d 1094.

JURISDICTION

The Court of Appeals entered judgment on June 18, 1984 (Pet. App. A-1). The Court of Appeals denied rehearing on October 3,

1984 (Pet. App. A-25). The Petition for a Writ of Certiorari in this case was filed on December 10, 1984, and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

I. Background

The Communications Act of 1934 (Communication Act or Act), 47 U.S.C. § 151 *et seq.*, established a dual federal/state system for regulating the provision of wire and radio communications services. Under that system, the Federal Communications Commission (FCC or Commission) regulates interstate communications while the states regulate intrastate communications.

Congress' intent to foster this dual regulatory approach is expressed in Section 2 of the Act, 47 U.S.C § 152.[1] Section 152(b) establishing the scope of state authority, provides in pertinent part:

> [N]othing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier. . . .

On the basis of the Act's reservation of power to the states, for the last 50 years, state regulatory agencies have been prescribing

[1] Sections 1-5 of the Act were codified at §§ 151-55 of Title 47 of the United States Code. In all other cases, the section numbers of the Act correspond to the section numbers in Title 47. Hereinafter, § 2 would be referrred to as § 152.

intrastate depreciation charges for telephone company plant and accounting classifications for telephone company expenses and taxes as part of their obligation to regulate intrastate communications. As late as April 1982, the FCC, in its Order Denying Preemption,[2] affirmed the well settled division of jurisdiction under the dual regulatory approach imposed by the Act. *See Pacific Tel. and Tel. Co. v. California,* 401 P.2d 353, 372-73 (1965).

The instant appeal is the result of the FCC's reversal of its earlier longstanding application of the Act. In the Preemption Order,[3] the FCC acknowledged its past acceptance of state authority to regulate the depreciation and accounting aspects of local exchange service, but indicated it now was preempting the states of their authority to regulate in this area. Specifically, the FCC preempted all state-authorized depreciation charges and accounting practices and classifications because it believed there was a need for intrastate utilities to accelerate their recovery of capital through depreciation charges to put them in a stronger financial position as they begin to face competition in the intrastate telecommunications industry. Thus, the FCC has extended its regulatory authority into one of the most basic mechanisms by which states have regulated intrastate communications over the last 50 years—the setting of depreciation charges and the establishment of accounting classifications applicable to the setting of rates for intrastate services. Both are fundamental elements of the rate setting process for intrastate service.

[2] *In re Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* 89 F.C.C.2d 1094 (1982) (Order Denying Preemption) (Pet. App. A-26).

[3] *In re Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* 92 F.C.C.2d 864 (1983) (Preemption Order) (Pet. App. A-55).

A. Depreciation Charges

Depreciation charges[4] make up a large element of the annual revenue requirement recovered in intrastate rates. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, (1934); *Smith v. Illinios Bell Telephone Co.*, 282 U.S. 133 (1930). In fact, depreciation charges amount to 10% to 20% of the intrastate revenue requirement. Public utility depreciation accounting is a process by which the cost of an asset[5] is fully recovered in rates over an asset's estimated productive life. National Association of Regulatory Utility Commissioners (NARUC), *Public Utilities Depreciation Practices* (1968). The sole purpose of depreciation is the recovery of investors' original capital investment.[6]

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[4] Depreciation means "the loss in service value not restored by currrent maintenance, incurred in connection with the consumption or prospective retirement of telephone plant in the course of service from causes which are not known to be in current operation, against which the company is not protected by insurance, and the effect of which can be forecast with a reasonable approach to accuracy. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in the art, changes in demand and requirements of public authorities." Uniform System of Accounts for Class A and Class B Telephone Companies, 47 C.F.R. § 31.01-3.

[5] The term asset as it is used in this context refers not to a single unit but to utility property combined into accounts containing homogeneous units which are then expressed in dollars, not specific units of equipment. National Association of Regulatory Utility Commissioners, *Public Utilities Depreciation Practices* (1968).

[6] Until the instant case, depreciation charges were set by having the individual pieces of equipment grouped together in units by year of installation. Then service lives were set for these units and computed to arrive at over-all service lives for each account. The setting of service lives was done by way of a three-way meeting between the FCC staff, the telephone company and the staff of the state regulatory agency. State and federal authorities have not always agreed on service lives and are not bound by these meetings. *See, N.Y. Tel. Co.*, Opinion 81-3, January 19, 1981; 21 NY/PSC 84, 133-34 (1981). The state or federal

State regulators must exercise their authority over intrastate depreciation charges because decisions relating to the timing of capital recovery of utility assets reflect, to a large extent, local conditions (demand for service, wear and tear, obsolescence, action of the elements) which are not amenable to nationwide estimates. For example, it is state regulators who authorize which telephone company or companies can operate within a given intrastate territory and the types of services such companies can offer. When a state regulatory agency authorizes a telephone company to operate within an area, offer new services or propose rates for services, one of the questions asked is whether premature plant replacement, which must be reflected in depreciation charges, will occur because of increased customer demand for basic telephone service, enhanced services (call forwarding, conference calling), new information age services (information access service, data transmission) or service upgrades (multi-party service). The FCC has never been in a position to forecast these demand factors on a region-by-region basis.

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jurisdiction then applied its adopted depreciation methodology to the portion of local plant allocated to it by the separations process.

The separations process assigns costs such as telephone property costs, revenues, expenses, taxes and reserves arising from jointly used plant between intrastate and interstate jurisdiction. This separation of costs arising from jointly used plant creates two distinct spheres of regulatory accounting which allows for the separability of the cash recovered through the depreciation process. Both the Act, § 410(c), and this Court, *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), have supported the use of the separations process as a means of allowing state jurisdictions to retain control over intrastate depreciation charges and accounting classifications.

Using the separations process, approximately 75% of the investment in local plant is currently allocated to intrastate services and about 25% to interstate services. Each jurisidiction after applying its own depreciation methodology then comes up with a dollar figure for the depreciation charges. This final figure then becomes part of a company's overall revenue requirement which is recovered in rates for either interstate or intrastate services. Thus, the depreciation procedure provides a means of recovering past capitalized expenditures through rates.

Further, in order to replace plant equipment, a company must be able to obtain financing at reasonable costs. Since the FCC does not regulate intrastate utility financing, it is not in a position to forecast the optimal time for discretionary upgrades and replacements. Many state commissions do have this regulatory responsibility.

Finally, under the FCC depreciation methods, a utility which is not actually facing premature plant replacement because of lack of customer demand for "new information age" services or lack of competitive pressures will be able to collect higher than warranted depreciation charges through the raising of local rates. This utility will in effect be given a windfall of cash which may be beyond what the utility realistically needs.

B. Accounting

A utility's expenses and taxes, comprising about 80% of its revenue requirements, are calculated on the basis of the analysis of costs for particular services. The services are broken down by accounting categories. These accounting categories are the regulatory accounting practices and classifications used by a utility company as directed by the particular state regulatory agency. Many state regulatory agencies have adopted the FCC's Uniform System of Accounts for Class A and Class B Telephone Companies, 47 CFR § 31.01-3, or similar systems to avoid requiring extensive duplicate records.[7] However, to effectuate a state's own ratemaking policy, states can require carriers to maintain separate intrastate accounting records for a few accounts, or for many accounts. Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107,* 57 Harv. L. Rev. 433, 438 (1944); Order Denying Preemption, 89 F.C.C.2d at 1107 (Pet. App. A-46). If the FCC's Preemption Order is allowed to stand, states will not be able to require utility companies to maintain accounting records different from those required by the FCC. Such a result will make it extremely difficult, as a

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[7] All utilities keep separate accounting records, in any event, for depreciation expenses used to compute income taxes (i.e. accelerated depreciation).

practical matter, for states to perform ratemaking computations different from those of the FCC.[8]

The FCC's preemption of depreciation charges and accounting classifications is a direct challenge to the historically accepted interpretation of the Act whereby states, not the FCC, have jurisdiction over intrastate depreciation charges and accounting classifications.

II. Proceedings Below

On March 31, 1981, the FCC issued an Order (Expensing Order) establishing expensing and amortization rules to replace depreciation procedures that had previously applied to the expenses incurred in connecting a telephone line to the telephone system.[9]

On April 20, 1981, the People of the State of California and the Public Utilities Commission of the State of California filed a Petition for Reconsideration, and the National Association of Regulatory Utility Commissioners filed a Petition for Clarification, both directed at the Expensing Order. The Petitions requested the FCC to clarify whether the Expensing Order preempted states from prescribing depreciation rates and using accounting practices and classifications for intrastate communications which differed from those used by the FCC.

In April, 1982, the FCC found that its Expensing Order did *not* preclude the states from utilizing different accounting and depre-

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[8] This result could also, as a practical matter, interfere with the implementation of state and federal holdings that the uniform system of accounts is not determinative for ratemaking at the state and federal level. *Alabama-Tenn. Nat. Gas Co. v. FPC,* 359 F.2d 318 (5th Cir. 1966); *Washington Pub. Interest Org. v. Pub. Serv. Comm. of the District of Columbia,* 393 A.2d 71, 81-82 (D.C. 1978); *Kansas Power & Light Co. v. State Corp. Comm. of Kansas,* 620 P.2d 329, 339 (Kan. Ct. App. 1980).

[9] *In re Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* 85 F.C.C.2d 818 (1981) (Expensing Order).

ciation procedures for intrastate ratemaking. Order Denying Preemption, 89 F.C.C.2d at 1108 (Pet. App. A-47). The FCC reasoned, based on a substantive review of the legislative history of the Communications Act, that Section 220[10] of the Act did not "preclude state commissions from departing from accounting or depreciation rules prescribed by this Commission for purposes of regulating intrastate telecommunications service rates." 89 F.C.C.2d at 1097 (Pet. App. A-31). The FCC also concluded that no valid federal policy would be frustrated if states employed their own accounting practices and classifications and depreciation charges. *Id.* According to the FCC, "[n]o policy of this Commission would be furthered by requiring state commissions to adhere to the depreciation and accounting rules we have adopted for purposes of computing the interstate revenue requirement. If carriers adhere to our rules for purposes of computing the interstate revenue requirement, our purpose will be achieved." *Id.* at 1107 (Pet. App. A-46). The FCC as well as American Telephone & Telegraph Company (AT&T) conceded that for years states have kept separate records, and that "federal regulation will not be frustrated if carriers maintain additional records for other purposes." *Id.* at 1108 (Pet. App. A-47).

AT&T and GTE Service Corporation sought reconsideration of the Order Denying Preemption before the FCC.[11] Upon reconsideration, the FCC reversed its earlier stand and adopted its Preemption Order of December 22, 1982, 92 F.C.C.2d 864 (Pet. App. A-80). This is the Order before this Court.

In its Preemption Order, the FCC determined that states were preempted from prescribing depreciation charges and accounting classifications which are inconsistent with those of the FCC. It did so for two reasons which it had rejected in its earlier Order

[10] Section 220 of the Act gives the FCC authority to set depreciation charges and accounting classifications for *interstate* companies. 47 U.S.C. § 220.

[11] They also sought judicial review in the United States Court of Appeals for the District of Columbia Circuit. *Amer. Tel. & Tel. v. FCC,* appeal docketed, No. 82-1747 (D.C. Cir. 1980) and *GTE Serv.Corp. v. FCC,* appeal docketed No. 82-1752 (D.C. Cir. 1982).

Denying Preemption: (1) It concluded that the language and history of Section 220 of the Communications Act preempted the states in this area, and (2) it determined that state regulation of depreciation and accounting practices would frustrate or interfere with the achievement of federal regulatory goals. On this latter point, the FCC alleged there was frustration of the general Congressional goal, as expressed in Section 151 of the Act which created the FCC for the purpose of regulating interstate communication, which was to make available, " 'so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ' ". 92 F.C.C. 2d at 876 (citing 47 U.S.C. § 151), (Pet. App. A-73-74). More specifically, the FCC asserted that "[s]tate depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment" would frustrate the FCC's goal of encouraging competition "in those markets found capable of supporting competition." *Id.*

The Virginia State Corporation Commission filed a petition for review of the Preemption Order in the Court of Appeals for the Fourth Circuit, with numerous other state agencies and organizations intervening.[12]

On June 18, 1984, the Fourth Circuit upheld the FCC's Preemption Order on the ground that preemption was necessary to prevent frustration of the federal purpose contained solely in Section 15 of the Act, 47 U.S.C. § 151, *Virginia State Corp. Comm'n. v. FCC,* 737 F.2d 388 (4th Cir. 1984) (Pet. App. A-1). Despite the specific reservation of authority to the states in Sections 152(b) and 221(b) to prescribe charges, practices and classifications for intrastate telephone service, the Court determined that "the foregoing provisions are rendered against a statutory backdrop that places *primary emphasis* upon a 'rapid, efficient, Nation-wide, and world-wide communication service,' " 737 F.2d at 392, (Pet. App. A-10) (Emphasis added), and concluded that preemption was justified because "interstate communications would undoubtedly be affected by the states' imposi-

[12] See list of parties, *supra.*

tion of depreciation policies . . . ". *Id.* at 395 (Pet. App. A-16).[13] The court found it unnecessary as a matter of law to reach the question whether Section 220 of the Act required preemption by the FCC.

In contrast, the dissent concluded that preemption of state prescribed depreciation charges and accounting classifications was neither permissible nor appropriate. Section 220(b) "cannot be read to 'require preemption' of state-imposed depreciation practices for the intrastate portion of carriers' operations." *Id.* at 397 (Pet. App. A-20) (Widner, J. dissenting).

The dissent asserted that the FCC had manufactured a conflict to justify its preemption of state jurisdiction. *Id.* at 398 (Pet. App. A-21). "[F]or all practical purposes", the conflict here is "nonexistent, and has been created by the FCC to rationalize a base for its decision." *Id.*

The dissent observed that the FCC must want to give the monopolistic local telephone companies more revenue now so that they can be aggressive in future non-regulated aspects of local service and any other business areas in which they can compete.[14]

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[13] The court did acknowledge that the policy conflict surrounding depreciation rates was "more attenuated than the very direct effect produced by physical connection of equipment to interchangeable lines . . . ." 737 F.2d at 395, (Pet. App. A-16). This was the situation found in the earlier physical impossibility preemption cases. Specifically, the Court was referring to *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 876 (1977); *and Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1984), *cert. denied*, 461 U.S. 938 (1983). In each of these cases the court observed that when separability of intrastate and interstate facilities is possible, as it is in the instant case, much of the potential for conflict is eliminated. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

[14] "The upshot of the case is that the FCC decided that the carriers needed more revenue than the state regulatory agencies were willing to provide, so it decided to impose different depreciation rates on intrastate equipment for the very purpose of, and thus effectively, raising the intrastate rates of the subscribers just as surely as if it had done so directly. I can find neither justification nor authority in the Communications Act for this action." 737 F. 2d at 399, (Pet.App. A-22-23).

(Also see Judge Greene's decision strongly criticizing the Bell Operating Companies' entrance into new businesses because it might interfere with their monopoly local exchange service (*United States v. Amer. Tel. & Tel.*, C.A. No. 82-0192, entered on July 26, 1984).

Yet, the FCC could find no provision in the Act authorizing preemption of local charges and classifications to increase industry earnings. *Id.* at 398. (Pet.App. A-22).

If the FCC's Order is permitted to stand, the effect would be to rewrite the Act to eliminate the states' legitimate regulatory role. As the dissent concluded:

> If the FCC can achieve preemption of state-prescribed depreciation methods by reciting the shibboleth of encouraging competition with as little showing of federal-state conflict as it has made here, it has effectively written 47 U.S.C. §§ 152(b) and 221(b) out of the Communications Act. It seems to me that any ratemaking changes that the carriers want can be adopted, if they persuade the FCC that they need the money, for any FCC adoption may be imposed on the States by virtue of the Supremacy Clause on the ground that the resultant additional revenue will help carriers in some theoretical way to compete in some market that need not even be specified, as it was not here. ***The logical result of this decision is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act.*** (Emphasis added.)

Id. at 398 (Pet. App. A-22).

SUMMARY OF ARGUMENT

The issue in this case is whether the Communications Act of 1934 authorizes the FCC to preempt the states' traditional function of setting depreciation charges and accounting classifications for local telephone service. This Court consistently has held that preemption is justified only where Congress intended to

preempt state regulation or there is an actual conflict between state and federal regulation. There is no basis for preemption in this case.

1. Section 152(b)(1) expressly reserves to the states the authority to set depreciation charges and accounting classifications for intrastate ratemaking. The legislative history of Section 152(b)(1) confirms that Congress intended to preserve state authority to regulate intrastate communication.

2. Even if the explicit language of Section 152(b)(1) is ignored, nothing in the Communications Act authorizes the FCC to preempt state regulation. The FCC's reliance on Section 220, which authorizes the FCC to set depreciation charges and accounting classifications for plant assigned to interstate communication, is misplaced. Section 220(j), as enacted, envisions regulation by federal and state regulators within their own spheres of authority, with the prospect of future Congressional action to harmonize the systems, if necessary. The legislative history of this subsection, as well as the rest of Section 220, confirms that Congress did not intend to authorize the FCC to preempt intrastate depreciation charges or accounting classifications. Read together, Sections 152(b)(1) and 220(j) reflect Congress' determination to safeguard the states' control of local regulation, to tolerate the diversity of dual regulation and to defer the issue of preemption of state regulation of depreciation and accounting for future legislation, if necessary.

3. Moreover, state regulation of depreciation charges and accounting classifications for intrastate ratemaking does not actually conflict with federal law. The general purpose clause of the Communications Act, Section 151, is too broad and too vague to justify preemption, when other parts of the Act explicitly give jurisdiction to the states. Further, there is no actual conflict between state and federal regulation, as defined by this Court's decisions. As Congress intentionally designed a system of dual federal-state regulation, dual regulation does not frustrate federal policies.

ARGUMENT

I. SECTION 152(b)(1) AND ITS LEGISLATIVE HISTORY DEMONSTRATE CONGRESSIONAL INTENT TO RESERVE TO THE STATES THE DEVELOPMENT OF INTRASTATE DEPRECIATION CHARGES AND ACCOUNTING CLASSIFICATIONS

This Court consistently has articulated a stringent legal standard for determining whether federal law preempts state law. Where federal action preempts activities traditionally regulated by the states, such as telephone service, the Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2376 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

Accordingly, the Court has sharply delimited the situations in which it will find that federal law invalidates state law. The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const. art. VI, cl. 2, "requires [the Court] to examine Congressional intent."[15] *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). The court has found Congressional intent to preempt state law (1) where there is an explicit statement of legislative intent to preempt, (2) where the legislative intent may be inferred from the pervasiveness of the federal regulation, or (3) where the intent may be

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[15] In addition, state regulation may be preempted by federal law "to the extent that it actually conflicts with federal law." *de la Cuesta*, 458 U.S. at 153. Actual conflict will occur where compliance with both state and federal regulations is a physical impossibility, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), or where state regulations stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough*, 105 S. Ct. at 2375, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

inferred because the federal interest in the field is so dominant.[16] *Hillsborough*, 105 S. Ct. at 2375.

Federal regulations, as well as federal statutes, may have preemptive effect. When a federal agency seeks to preempt state law, the Court must examine "whether the [agency] meant to preempt [the state] law, and, if so, whether the action is within the scope of the [agency's] delegated authority." *de la Cuesta*, 458 U.S. at 154.

In this case, the FCC has expressed its intent to preempt state regulation of depreciation and accounting for intrastate ratemaking. 92 F.C.C.2d at 880 (Pet. App. A-79). However, the inquiry does not end there. An agency's authority is "rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Thus, the question of agency authority turns on Congressional intent. *de la Cuesta*, 458 U.S. at 162.

Applying these standards to this case, the FCC has failed to justify preemption. The Communications Act reserves the authority to set intrastate depreciation charges and accounting classifications to the states. The Act does not authorize the FCC to preempt such authority. Rather, it carefully limits the agency's authority to interstate communications. 47 U.S.C. § 152(a).

A. Section 152(b)(1) Reserves the States' Jurisdiction Over Intrastate Depreciation Charges and Accounting Classifications

Section 152(b)(1) denies the FCC jurisdiction over "charges, classifications, [and] practices" relating to intrastate telephone

[16] Here, Congressional intent to preempt the entire field of telecommunications may not be inferred from the pervasiveness of the federal regulation of the field because the Act clearly leaves at least some aspects of intrastate communications for state regulation. *See, e.g.*, § 152(b). Similarly, the federal interest in intrastate communications is not sufficient to justify an inference of preemptive intent based upon the dominant federal interest in the field. *See Hillsborough*, 105. S. Ct. at 2378; *Hines v. Davidowitz*, 312 U.S. 52 (1941) (recognizing dominant federal interest only in the sphere of foreign relations).

communications. These terms of art include *depreciation* and *accounting*.

This Court repeatedly has held that where Congress has used technical terms of art to define jurisdictional boundaries, they should be interpreted by reference to the industry or trade to which they apply. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). As shown below, academicians, regulators, industry experts, and the courts all traditionally have referred to depreciation and accounting in terms of " charges", "practices", and "classifications". *Smith v. Illinois Bell Telephone Co.* 282 U.S. 133, 158 (1930), Kahn, *The Economics of Regulation* 117-122 (1970); Priest, *Principles of Utility Regulation* 112-16 (1969); NARUC, *Public Utility Depreciation Charges* 2 (1968).[17]

Since their inception, the Interstate Commerce Commission (ICC) and the FCC have repeatedly described depreciation as "charges, classifications and practices".[18] In fact the FCC Order under review defines depreciation as "*charges*, to operating expense" which recover capitalized costs over time. 92 F.C.C.2d at 851 (Pet. App. A-61). It can hardly be contested, therefore, that Section 152(b)(1)'s prohibition against the FCC's development of intrastate "charges, classifications, and practices" forecloses preemption of depreciation and accounting.

Textbooks, professional treatises, utilities, regulators and the courts consistently have defined accounting in terms of "classifi-

[17] The framers of the Communications Act consistently discussed depreciation and accounting in terms of "charges" and "classifications". S. Rep. No. 781, 73d Cong., 2d Sess. (1934); H.R. Rep. 8301, 73d Cong., 2d Sess. 17 (1934). Indeed, § 220 empowers the FCC to set interstate 'depreciation charges'.

[18] As noted below, the ICC regulated interstate communication prior to the creation of the FCC. *E.g., Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926); *In re Amendment of Part 31 Uniform System of Accounts for Class A and Class B Telephone Companies*, FCC Docket No. 82-679 (1982); *In re Prescription of Revised Percentages of Depreciation*, FCC Docket No. 82-93 (1983); *Amendment of Annual Report Form M*, FCC Docket No. 82-513 (1982).

cations", "practices", and "regulations."[19] Indeed, the FCC repeatedly has described accounting in these terms and did so in both its Order Denying Premption and the Preemption Order under review. It is clear, therefore, that Congress was preserving the states' exclusive jurisdiction over intrastate depreciation charges and accounting classifications, and practices in connection with intrastate communication service.

B. The Legislative History of Section 152(b)(1) Evidences Congress' Intent to Reserve Local Depreciation and Accounting Matters to the States

The legislative history of Section 152(b)(1) demonstrates Congress' intent to preserve state power to regulate intrastate communication. As the Committees considering the Act reported, Section 152 "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934). *See also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934). Congress specifically invited the state regulators to draft the provision[20] which ultimately became Section 152(b)(1)[21] for the purpose of preserving state

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[19] *E.g., Norfolk v. Western Ry Co.*, 287 U.S. 134 (1932); Phillips, *The Economics of Regulation* (1969).

[20] During the Senate hearings on S.6, Senator Dill invited state commission representatives to submit language reserving this authority to the state commissions. *Hearings on S. 6 Before the Senate Interstate Commerce Committee*, 71st Cong., 2d Sess. 2180 (1930). *See also, Hearings on H.R. 8301 Before the House Interstate and Foreign Commerce Committee*, 73d Cong., 2d Sess. 16 (1934) (statement of Dr. Stewart). For the state proposals, *see* S. __, 73d Cong., 2d Sess. § 210 (Feb. 10, 1934) (Confidential Comm. Print No. 2); H.R. 8301, 73d Cong., 2d Sess. § 210 (Feb. 27, 1934) (Committee Print).

[21] The state proposal originally appeared as § 210 of the Act. During the Act's development, however, Congress moved this provision to § 152(b). A statement by one of the ICC commissioners indicates that the move was made because it was "more logical" to place all of the provisions relating to the Act's application in a single section. *Hearings on S. 2910 Before Senate Interstate Commerce Committee*, 73d Cong., 2d Sess. 210 (1934) (statement of Mr. McManamy).

regulatory authority. Thus, Congress' enactment of Section 152(b)(1) represents a significant substantive effort to preserve state authority over intrastate communications.

Moreover, Congress was well aware that tensions would develop where state regulation of intrastate communication affected the federal regulation of interstate communications. The legislative history of the Communications Act shows that Congress elected not to extend the FCC's authority over interstate communication to include such intrastate regulation which affected interstate communications.

Congress' experience with railroad regulation under the Interstate Commerce Act had demonstrated the effect of such an extension of federal authority. In *Houston, East and West Texas Railroad Co. v. United States*, 234 U.S. 342 (1914) (the *Shreveport Rate Cases*),[22] the Supreme Court recognized the ICC's authority to set intrastate rates where those rates had an effect on interstate rates. Relying on this authority, the ICC had almost completely supplanted state railroad regulation.

The Communications Act's legislative history indicates that Congress sought to prevent a similar division of regulatory authority over telecommunications. Congress recognized that the *Shreveport* doctrine allowed the FCC to supplant state authority over intrastate communication. Expressing a desire to leave the bulk of communications regulation with the states,[23] Congress

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[22] *See also Railroad Comm'n of Wisconsin v. Chicago Burlington & Quincy Railroad Co.*, 249 U.S. 563 (1922). The rule was ultimately codified in the 1920 Amendments to the Transportation Act.

[23] *See Hearings on S. 6 Before the Senate Interstate Commerce Committee*, 73d Cong., 2d Sess. 2133, 2152 (1930) (statements of Sen. Dill); *id.* at 2179 (statement of Sen. Smith); *id.* at 2141 (statement of Sen. Brookhart) (intent to "safeguard the rights of the States . . . "); *id.* at 2184-85 (statement of Sen. Smith) (under *Shreveport* doctrine, regulation of the limited interstate business can dominate intrastate regulation).

made clear its intent to protect state authority over telecommunications from application of the *Shreveport* doctrine.[24]

A fair reading of Section 152(b)(1) and its legislative history leaves little doubt that Congress intended to preserve, for the indefinite future, the states' authority to regulate intrastate telecommunications, including regulations which affect interstate regulation. As Congress has expressly evidenced its willingness to tolerate accounting and depreciation practices which may be at odds with FCC policies, state regulation cannot frustrate the FCC's lawful purposes. Specifically, this Court has stated that:

> In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation [of a state policy may impair the implementation of a federal policy] is not a sufficient reason for concluding that Congress intended to preempt that exercise of state power.

New York Telephone Co. v. New York Dept. of Labor, 440 U.S. 519, 546 (1979).

The FCC thus has no authority to override Congress' preservation of the states' exclusive jurisdiction over local depreciation and accounting matters.

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[24] Senator Dill, the Chairman of the Interstate Commerce Committee and sponsor of both S. 2910 and S. 3285, stated:

> [W]e wrote in certain provisions that are not in the Interstate Commerce Act, to protect the State commissions against being overridden by this Commission, as the Interstate Commerce Commission has overridden some of the railroad State commissions.

Hearings on S.2910 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 179 (1934). *See also* 78 Cong. Rec. 8823 (1934) (statement of Sen. Dill); *Hearings on H.R. 8301 Before the House Interstate and Foreign Commerce Committee*, 73d Cong., 2d Sess. 74 (1934) (statement of Mr. Clardy).

II. NEITHER SECTION 220 NOR ANY OTHER PROVISION OF THE COMMUNICATIONS ACT CONTAINS THE "DIRECT AND UNAMBIGUOUS" LANGUAGE REQUIRED TO AUTHORIZE THE FCC's PREEMPTION ORDERS

Even if one ignores the explicit language of Section 152 (b) (1), the Communications Act cannot be read to authorize preemption. Preemption requires a showing (particularly where state regulation pre-dates Congressional action) of clear Congressional authorization to override state regulation. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. at 625. The Communications Act, however, offers no evidence of a Congressional intent to preempt. Indeed, even Section 220, the linchpin for the Commission's preemption theory, demonstrates Congress' decision to preserve the states' traditional power in this area.

A. The Communications Act's Historical Context Explains Congress' Reasons for Preserving the State's Power Over Local Depreciation and Accounting

The historical context in which the Act developed is critical to determining the Act's preemptive intent. If Congress, aware of state regulatory activity, had intended to preempt state regulation, it would have expressed that intent in "direct and unambiguous language." Absent such language, Congressional intent to preempt should not be inferred. *New York State Dept. of Social Service v. Dublino*, 413 U.S. 405, 414 (1973).

Prior to the development of the Act, federal regulation of telecommunications was limited, with state regulators assuming most of the regulatory burden. *Hearings on S. 2910 Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 81 (1934) (statement of Walter S. Gifford, Pres., Amer. Tel. & Tel.) (states presently regulate telephone rates). The Interstate Commerce Commission regulated interstate telephone service, 36 Stat. 545 (1910), but it[25] recognized the states' primary role in

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[25] At that time, the ICC had scant resources and little reason to regulate telecommunications, much less infringe on state regulation. This was so for two reasons. First, public attention was focused not on

regulating intrastate telephone service.[26] Indeed, in 1926, the ICC declared that:

> The great bulk of telephone business is of strictly local concern, and the state commissions are much better informed and equipped than we are to pass upon the conditions surrounding the local service.

Depreciation Charges of Telephone Companies, 118 I.C.C. 295, 374 (1926).

The ICC therefore rejected industry requests that it preempt the states' development of intrastate depreciation charges and accounting classifications. *Id.* Similarly, the Supreme Court acknowledged the role of state regulators in establishing depreciation charges in connection with intrastate telephone service and the appropriateness of using separate federal and state charges of depreciation for the same property. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930).

It is understandable, therefore, that the Act does not contain even the hint of language authorizing FCC preemption of intrastate regulation. Rather, the Act as a whole indicates an intent not to preempt the states, but to safeguard state regulation of local charges and classifications.[27] As Congress did not make the requisite "direct and unambiguous" expression of an intent to authorize preemption, the FCC's effort to preempt state depreciation regulation is invalid and must be set aside.

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telephone communications but on the need for railroad reform, which had been the ICC's primary responsibility since its creation in 1887. *See*, 78 Cong. Rec. 4134 (1934) (statement of Sen. Dill). Second, since over 90% of all telephone calls were intrastate (originated and completed within a single state's borders), state legislatures had already become relatively well-equipped to regulate telephone facilities. As early as 1912, various Bell System Companies and state regulatory agencies had already developed a methodology for "separating" telephone plant expenses and revenues devoted jointly to interstate/intrastate calling. *See*, FCC/NARUC Separations Manual, 2.

[26] *See, e.g.*, Transportation Act of 1920, § 407, 41 Stat. 27 (1920).

[27] Congress in the Act did not intend to "greatly change or add to existing law." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

B. The Enactment of Section 220 Without Any Reference to Intrastate Depreciation Charges or Accounting Classifications Further Demonstrates Congress' Intent to Preserve the States' Exclusive Jurisdiction Over Intrastate Regulation

In its Order Denying Preemption, the FCC concluded that "*at most* this legislative history indicates that . . . the 1934 Congress was *not sure* whether reenactment of the Interstate Commerce Act language would or would not preempt state accounting and depreciation rules and did not choose to resolve the question at that time." 89 F.C.C. 2d at 1106 (Pet. App. A-44). (Emphasis added.) However, in its subsequent Preemption Order, the FCC claimed that "the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier." 92 F.C.C. 2d at 873 (Pet. App. A-69).

It is Section 220(j) which addresses the relationship of state and federal regulation. As finally enacted, that section expressly assumed dual regulation of depreciation and accounting matters. Moreover, a review of Section 220's legislative history, and that of its predecessor—Section 20(5) of the Interstate Commerce Act—belies the FCC's conclusion. Section 20(5) was not intended to preempt the states' development of either intrastate depreciation charges or accounting classifications, and its reenactment in the Communications Act, without reference to intrastate depreciation and accounting, evidenced Congress' satisfaction with the status quo; that is, the states' development of intrastate depreciation and accounting.

1. Section 220(j), As Finally Enacted, Assumed Dual Regulation of Depreciation Charges and Accounting Classifications

Section 220(j) governs the relationship of state and federal authority in establishing depreciation rates. Section 220(j) provides:

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the state commissions with respect to matters to which this section relates.

47 U.S.C. § 220(j). Thus, the statute envisions regulation by federal and state regulators each within their own spheres of authority. It specifically leaves the issue of preemption and the relationship between the actions of these regulators for future legislation.

Nothing in the legislative history of the Communications Act indicates a contrary Congressional intent. The original bill attempted to safeguard the states' jurisdiction of intrastate matters through a predecessor to Section 152(b)(1), *see* note 21, *supra*, and a proposed Section 220(j), which provided:

> (1) Nothing in this section shall limit the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction with respect to any carrier, the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation, for the purpose of determining charges, accounts, records, or practices; or (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by a State commission in pursuance of authority granted under State law.

H.R. 8301, 73d Cong., 2d Sess. § 220(j) (1934) (as introduced); S.2910, 73d Cong., 2d Sess. § 220(j) (1934) (as introduced).

Under this provision, FCC depreciation and accounting regulation pursuant to Sections 220(a) and (b) would not preempt state accounting and depreciation regulation.

The Senate Committee on Interstate Commerce modified Section 220(j) to remove its protection of the states' authority to set intrastate depreciation charges and accounting classifications.[28] The revised bill, which was passed as S. 3285 and referred to the House Committee on Interstate and Foreign Commerce,

[28] That bill provided:

(Footnote continued on following page)

implicitly assumed that the FCC was able to preempt the states' development of depreciation charges and accounting classifications.[29]

The House Committee on Interstate and Foreign Commerce thereafter modified S.3285 to reinstate the original Section 220(j), which expressly prohibited preemption. The House adopted this provision, creating a conflict with the Senate's bill.

The provision ultimately negotiated in the House-Senate conference and subsequently enacted into law removed any suggestion of preemption and deferred further consideration of the issue until the FCC had an opportunity to 1) study the current system; and 2) report back to Congress. Specifically,

> The substitute adopts . . . a modified provision *for investigation and report to Congress* as to the need for defining or harmonizing Federal and State authority in respect to other

> (j) The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State law, to prescribe their own percentage rates of depreciation or systems of accounts, records, or memoranda to be kept by carriers.

S.3285, 73d Cong., 2d Sess. § 220(j) (1934) (as passed by Senate).

[29] "Section 220(j) of the Senate bill (relating to accounts and depreciation charges) authorizes the Commission to investigate and report to Congress upon the desirability of legislation . . . permitting State commissions to prescribe *their own* percentage rates of depreciation and systems of accounts for carriers." (Emphasis added.) H.R. Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934). Obviously, no purpose was to be served in investigating the propriety of permitting the states to develop their own depreciation charges and accounting classifications unless the FCC had first preempted them, an event which had not taken place as of 1934. Thus, S. 3285's Section 220(j) assumes FCC preemption.

matters [i.e., those relating to accounts and depreciation charges]. (Emphasis added.)

H.R. Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934). Thus, the new Section 220(j) assumed dual regulation of depreciation and accounting, with the prospect of future Congressional action to "harmonize" the system, if necessary.

2. Sections 220(h) and (i) reflect Congress' Recognition of the States' Predominant Role in the Development of Depreciation Charges

Similarly, Section 220(h) (which authorizes the FCC to waive compliance with its depreciation and accounting orders) and Section 220(i) (which requires the FCC to notify state commissions of its proposed actions regarding "accounts, records or memoranda") do not assume that the FCC could preempt the states' development of depreciation charges and accounting classifications for intrastate operations. Rather, the waiver and notice procedures found in these provisions simply reflect the fact that the FCC, in its early years, lacked the experience, expertise, and funding to set *interstate* depreciation charges. 1938 F.C.C. ANN. REP. 32; 1940 F.C.C. ANN. REP. 34. Thus, in Section 220(h), Congress gave the FCC discretion to permit the states to set *interstate* depreciation rates "where such carriers [were] subject to state commission regulation."[30] Likewise, Section 220(i) required the Commission to draw on the states' expertise in setting *interstate* depreciation charges and accounting classifications.

The FCC's current reading of Sections 220(h) and (i) is also contradicted by the fact that these provisions were introduced in the same bill which included the original Section 220(j), discussed above. The original Section 220(j) undeniably prohibited preemption. Congress could not have assumed that Sections 220(h) and (i) authorized FCC preemption of state regulation when Section 220(j) expressly prohibited preemption.

[30] Pursuant to § 152(b)(2) the states have traditionally set *all* depreciation charges for non-affiliated, independent telephone companies.

3. Section 20(5) of the Interstate Commerce Act Did Not Authorize the Interstate Commerce Commission to Preempt Either Intrastate Depreciation Charges or Accounting Classifications

The FCC concluded that Section 220(b) authorized preemption because its predecessor, Section 20(5) of the Interstate Commerce Act, allegedly "preempted the State commissions' jurisdiction over depreciation." 92 F.C.C. 2d at 873 (Pet. App. A-69).[31] The legislative history of Section 20(5) offers no support for the Commission's position.

Section 20(5) was enacted as part of the 1920 Transportation Act almost fifteen years before the creation of the Federal Communications Commission. While several sections of the Interstate Commerce Act expressly preempted state regulation, *e.g.*, Section 20(a)(7) (state securities regulation) and Section 13(4) (state discriminatory ratemaking), Section 20(5) did not do so. Thus, when the ICC was asked to preempt the states from setting depreciation methods for intrastate telephone plant, it refused because "the state commissions are much better informed and equipped than we are to pass upon the conditions surrounding the local service . . . ". *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295, 374 (1926).

As the FCC originally acknowledged, Section 20(5), offers no basis from which to imply a Congressional intent to authorize depreciation preemption in Section 220:

> Inasmuch as Section 20 had never been construed to restrict state commissions from requiring carriers to keep additional records for purposes of intrastate ratemaking and Court decisions in analogous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict State commis-

[31] Section 220(a), relating to accounting, stemmed from the Hepburn Act of 1906. As the Commission originally recognized, "there is no indication in the legislative history of the Hepburn Act that the 1906 Congress wished to curb State regulation . . . ". Order Denying Preemption, 89 F.C.C. 2d at 1099 (Pet. App. A-33).

> sions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Order Denying Preemption, 89 F.C.C. 2d at 1102 (Pet. App. A-36). Section 20(5) made no reference to preemption, intrastate depreciation, or a need for uniformity, and therefore it was never held to authorize preemption.

By modeling Section 220(b) upon Section 20(5) Congress evidenced its satisfaction with the status quo; that is, the states' development of intrastate depreciation charges and accounting classifications. Therefore, the FCC may not claim that Section 220 expressly authorizes preemption.

III. THERE IS NO CONFLICT BETWEEN FEDERAL AND STATE REGULATION OF DEPRECIATION CHARGES OR ACCOUNTING CLASSIFICATIONS THAT REQUIRES PREEMPTION

In recognition of the strong presumption against preemption, the Court has sharply delineated those situations in which it finds that the Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates state law. Preemption will be justified under the Supremacy Clause only where (1) compliance with both state and federal regulation is physically impossible;[32] or (2) state regulation represents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillborough County*,

[32] The Fourth Circuit conceded that "physical impossibility" does not apply to this case. Telephone companies may comply with federal and state regulations by maintaining separate books of accounts and by setting depreciation charges only on the joint plant allocated to them by the separations process. *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388, 396 (4th Cir. 1984) (Pet. App. A-16). *See also North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976); *Computer and Communications Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

105 S. Ct. at 2375 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

As discussed below, the FCC's general purpose of regulating interstate communication to make "available, so far as possible . . . a rapid, efficient, Nation-wide . . . communications service", 47 U.S.C. § 151, is too broad and vague to support conflict preemption. Specifically, general purpose language such as that found in Section 151 embodied solely in the preamble of the Act cannot be used to infer a Congressional objective to preempt when other parts of the Act explicitly give jurisdiction to the States. Moreover, state law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden". *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). As demonstrated, the alleged frustration of federal policies caused by dual regulation does not meet this standard.

A. The Communications Act's General Purpose Clause, Section 151, Does Not Support Preemption of State Regulation of Intrastate Communication

1. Section 151 Does Not Establish a Sufficiently Definite Federal Purpose to Support Preemption When Other Parts of the Act Explicitly Give Jurisdiction Over Intrastate Communication to the States

The lone statutory source for the federal interest in the development of a national communications service is the Act's general purpose clause, Section 151. This provision serves two functions. It lists four "purposes" of the Act and creates the FCC "to execute and enforce the provisions of this Act.[33] Notably, Section 151 identifies the statutory purpose of the FCC as

[33] Section 151 provides:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the

> regulating *interstate* . . . commerce in communication by wire . . . so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . .

47 U.S.C. § 151. (Emphasis added.)

A plain reading of the statutory language demonstrates that Congress did not intend to give the FCC broad powers to regulate intrastate communications. While Section 151 clearly enunciates a goal of developing a national telecommunications service, this section urges accomplishment of this goal only through regulation of "interstate communication." Thus, the language of Section 151 does not support a broad exercise of regulatory power over intrastate communications by the FCC.[34]

> national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 151.

[34] The legislative history of § 151 further supports such a limited reading of the statute. When Congress considered the Act, there was very little discussion of § 151. Both the Senate and House reports simply stated that § 151 declared the purpose of the Act and established the FCC. S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934). Neither the Conference Report's analysis of the bill, H.R. Rep. No. 1918, 73rd Cong., 2d Sess. 45 (1934), nor the floor debate explain this section. 78 Cong. Rec. 8823 (1934) (Sen. Dill's introducing bill begins with discussion of Sec. 2; *id.* at 10313). (Rep. Rayburn's introducing bill simply notes that the section states the Act's purpose and creates the FCC). Given the widespread interest in the relationship between state and federal regulation, § 151 would have received much more attention if Congress had viewed the provision as altering the division of regulatory authority between the FCC and the states.

In similar cases, this Court has ruled that when Congress explicitly gives states jurisdiction over an area, broad statements of general federal policies do not justify preemption of state regulations when that policy is not developed further by any specific operative provisions of the statute.[35] For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 198 (1983), the party seeking preemption argued that state law frustrated the Atomic Energy Act's purpose to develop the commercial use of nuclear power. The Court found that, even though Congress' purpose was to develop nuclear power, the promotion of this purpose could not be accomplished "at all costs" when Congress had explicitly preserved state authority. General statements in federal statutes, although reflecting Congress' desire to encourage a certain activity, do not demonstrate a Congressional intent to preempt all state actions that may have an adverse impact especially when the Congressional intent to preempt is not unmistakably clear. *Pacific Gas & Electric Co.*, 461 U.S. 198; *Silkwood v. Kerr McGee Corp.*, 104 S.Ct. 615 (1984); and *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375 (1983). When this test is not met, "the *legal reality* remains that Congress has left sufficient authority in the states . . . ". 461 U.S. at 223 (Emphasis added). Thus, as Section 151 is indefinite, the FCC may not use it as a basis for preemption.

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[35] Interpreting the § 151 reference to the Communications Act's purpose of establishing an interstate telecommunications network, the District of Columbia Circuit has stated:

> This longterm goal which the Commission sets out for itself apparently has its roots in the general purpose section of the Act, 47 U.S.C. § 151. While that section does set forth worthy aims towards which the Commission should strive, it has not heretofore been read as a general grant of power to take any act necessary and proper to those ends. Especially in view of our conclusion that § 152(b) seems to bar Commission jurisdiction in this case, *see* Section I *supra*, we are extremely dubious about the legal substance of this argument by the Commission, even if the facts were available to support it.

National Ass'n of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 613-14 n. 77 (D.C. Cir. 1976).

2. Section 151 Does Not Establish a Sufficiently Narrow Federal Purpose to Support Preemption

This Court has consistently refused to use broadly stated purpose language, such as that found in Section 151, as a basis for preemption. *E.g., Commonwealth Edison Company v. Montana*, 453 U.S. 609, 633-34 (1981). In that case, the Court rejected the contention that a state mining tax was preempted by "national energy policies . . . encouraging the production and use of coal . . . ". *Id.* at 633. Such broad statements would not be interpreted as a Congressional decision to preempt conflicting state law. *Id.* 633-34. Instead, the Court ruled that it must "look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict" to justify preemption. *Id.* at 634.[36]

Preemption based upon a conflict with the federal interest in "rapid development of interstate facilities" is equally inappropriate. As the Fourth Circuit dissent recognized, allowing preemption based upon a recitation of "the shibboleth of encouraging competition . . . " would "permit the FCC to abrogate completely the state regulation of intrastate ratemaking." *Virginia State Corporation Comm'n v. FCC*, 737 F.2d at 398 (Widener, J. dissenting) (Pet. App. A-22).[37] Moreover, such a result conflicts

[36] An earlier decision interpreting the Act demonstrates these same principles. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963). In *Head*, the Court rejected a contention that state professional advertising regulation was preempted by a Congressional authorization that the FCC review broadcast license applications under a "public interest, convenience and necessity" standard which arguably included advertising content. A broad scheme of state advertising regulation would not be preempted "when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest . . . '." 374 U.S. at 431.

[37] Specifically, the dissent found that the conflict relating to competition was "for all practical purposes nonexistent, and has been created by the FCC to rationalize a base for its decision". *Virginia State Corp. Comm'n v. FCC, supra*, 737 F.2d at 398 (Pet. App. A-21). The dissent supported this finding by pointing out the vague position the FCC had taken regarding the connection between depreciation and competition.

(Footnote continued on following page)

with the dual federal-state regulatory scheme underlying the Act. Accordingly, under the rationale of *Commonwealth Edison Co. v. Montana*, 453 U.S. at 634, and *Exxon Corp v. Governor of Maryland*, 437 U.S. 117 (1978), a conflict with the FCC's broad competitive policies for the interstate market does not justify preemption of state regulation of the intrastate market.

B. The Extent of the Conflict Between State and Federal Regulation, If Any, Is Not Sufficient to Justify Preemption Due to Frustration of Federal Purposes

Assuming, *arguendo*, that this Court reaches the conflict preemption question, the FCC has not met its burden of establishing a conflict between state and FCC policy which can be shown substantially to frustrate the objectives and purposes of Congress. This Court has required substantially more than inconsistency between the state and federal regulations before it has preempted state regulation as frustrating federal purposes. Preemption is justified only where state regulation "substantially frustrates national . . . policies." *Commonwealth Edison Co. v. Montana*, 453 U.S. at 633. State law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will

For example, the FCC claimed its newly prescribed depreciation methods, which give the carriers more revenue in earlier years, better reflect economic reality and thus will increase market efficiency, encourage technological innovation, and otherwise promote competition. The dissent noted that the FCC never defined the relevant marketplace. It is unclear whether the FCC was referring to the interstate market for long distance service, the intrastate market for long distance service, the equipment market, the local service market or some other market. The FCC also never offered any support for the proposition that there is a connection between capital recovery through depreciation charges and the creation of competition in some marketplace. The dissent found that the FCC's

> ". . . unsupported and unsupportable statements as to the effect on competition of inconsistent state depreciation methods, do not provide even a modicum of reasoned analysis supporting the FCC's decision to interfere in state ratemaking after several decades of affirmatively espousing the opposite conclusion."

737 F.2d at 399 (Pet. App. A-23).

demand that state law be overridden." *Hisquierdo v. Hisquierdo*, 439 U.S. at 581. Especially where Congress envisioned dual regulation, preemption doctrine recognizes that some tension between federal and state regulation should be tolerated. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct 615 (1984); *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 198 (1983).

The Court's recent decision in *Hayfield Northern Railroad Co. v. Chicago and Northwestern Transportation Co.*, 104 S. Ct. 2610 (1984), indicates that substantial conflict between the federal and state regulatory scheme will be tolerated before state law will be preempted. *Hayfield* involved the Staggers Act Amendments to the Interstate Commerce Act establishing a procedure for allowing railroads to abandon unprofitable routes. After the federal agency authorized abandonment by the railroad, Minnesota sought to use its condemnation authority to prevent the railroad from dismantling the railroad bed for use elsewhere. The Court recognized a conflict between the federal purpose of promoting competition, efficiency and productivity in the railroad industry and the state condemnation procedure. Viewing the statutory scheme as a whole, however, the Court ruled that "state condemnation authority is not preempted merely because it may frustrate the economically optimal use of rail assets." *Id.* at 2619. Accordingly, the state action was allowed to stand.

Conversely, the cases in which the Supreme Court has preempted state regulation because of frustration of federal objectives have involved actual conflicts. In *Lawrence County v. Lead-Deadwood School District*, 105 S. Ct. 695 (1985), the Court preempted a state statute which required local governments to distribute funds received from the federal government in lieu of taxes on federal land in the manner they distributed regular tax revenue. The federal statute authorized local governments to spend this money for "any governmental purpose". The federal system, therefore, gave local officials greater flexibility in determining how they would spend the federal funds. The Court found that the effect of compliance with the state statute was to deprive local governments of the flexibility which the federal stature sought to provide and to drain the federal statute of almost all

meaning. 105 S. Ct. at 699. The state statute was preempted, therefore, because it frustrated the federal purpose of providing flexibility to local officials.

The state action in this case involves regulation of intrastate communications. It does not affect the ability of the FCC to establish depreciation policies applicable to interstate communications. This is not a case like *Lawrence County* where compliance with state regulations will drain the federal action "of all meaning". Accelerated depreciation, as prescribed by the FCC, will remain the rule for interstate communications. Thus, state regulation does not "frustrate" federal goals.

Even if there were a significant conflict between state regulation and the federal purpose, this conflict would not require preemption. In *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 198 (1983), the Court acknowledged that the Atomic Energy Act gave the federal government exclusive control over the safety aspects of nuclear energy, *id.* at 205, and that "a primary purpose of the Atomic Energy Act was . . . the promotion of nuclear power". *Id.* at 221. Nevertheless, the court allowed state economic regulation to stand. In the Court's view, Congress intentionally designed a system of dual federal-state regulation of nuclear power. *Id.* at 211-12. Because of this division of regulatory power, the court ruled that state regulation would not be preempted as frustrating the federal purpose if it slowed or even stopped the development of nuclear power. *Id.* at 223. Redefinition of the regulatory scheme to prevent states from exercising their proper authority in a manner which "undercut federal objectives," was a matter for legislative, not judicial action. *Id.* at 223.

Similarly, the Communications Act creates a scheme of dual federal-state regulation. As the Court found in *Pacific Gas and Electric Co.*, some tension between these competing schemes must be tolerated so long as each sovereign is acting within its proper sphere of authority. Where reconcilable conflicts arise, preemption of state regulation is inappropriate. So long as state telecommunication regulation stays within the proper sphere of state authority, the Court should not preempt state regulation

even if it "undercuts" federal regulatory goals in some ill-defined way. If the FCC desires to change this result, it should seek legislation from Congress altering the regulatory scheme, not seek a judicial redefinition of the regulatory scheme through the use of preemption.

Congress, well aware of the stresses and strains on the Communications Act's regulatory scheme in this "information age," has not changed the Act. Instead Congress has preserved the dual regulation of telecommunications. Indeed, "if the Commission believes it needs additional remedial power . . . it should seek such power from Congress . . . . [The courts are] no more authorized than is the Commission to rewrite the law". *Interstate Commerce Comm'n v. American Trucking Ass'n, Inc.*, 104 S. Ct. 2458 (1984) (O'Connor, Blackmun, Powell, Stevens, J.J. dissenting). In failing to await Congressional action, the FCC has acted as though "Congress needs . . . help from generous judicial implication to achieve the supercession of state authority"—despite the ability of "Congress [to] speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the states". *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 780 (1947) (separate opinion of Frankfurter, Murphy and Rutledge, JJ.).

C. The States' Regulation of Intrastate Depreciation Charges And Accounting Classifications Does Not Frustrate The FCC's Lawful Purposes

The FCC in its Order Denying Preemption found that if "the carriers maintain the records we require for purposes of interstate ratemaking, federal regulation will not be frustrated if carriers maintain additional records for other purposes". 89 FCC 2d at 1108 (Pet. App. A-47). However, in its Preemption Order, the FCC reversed its earlier reading (not only of the law, but of the facts) and suggested, for the first time in its 47 year history, that dual regulation of depreciation charges and accounting classifications frustrated the implementation of FCC general purposes found in Section 151. 92 F.C.C. 2d at 876 (Pet. App. A-74). The FCC explained its new position by claiming that preemption was needed to:

(1) assure the utilities' timely recovery of capital investments through local rates; which would allegedly,

(2) encourage technological innovation; which would allegedly,

(3) protect the utilities' ability to compete with new entrants to their markets, thereby safeguarding a "rapid and efficient" telecommunications system.

Id. at 876-78 (Pet. App. A-74-75). Each of these positions, however, provides no basis for establishing the type of conflict which this Court has found necessary to justify preemption.

1. Preemption Is Not Needed to Assure the Utilities' Timely Recovery of Capital in Local Rates Because State Regulators Are Already Required to Set Intrastate Depreciation Charges Which Allow for Timely Capital Recovery

The Fourteenth Amendment prohibits state governments from taking the private property of their citizens without rendering them "just compensation." In 1894, the Supreme Court extended the protection of the Fourteenth Amendment to investor-owned utilities when it held, "justice demands that everyone should receive some compensation for the use of his money or property". *Reagan v. Farmers' Loan and Trust Company*, 154 U.S. 362, 412 (1894).

Since the late nineteenth century, state regulators have assumed the responsibility of setting intrastate depreciation charges which preserve the financial integrity of telephone corporations and other public utilities within their jurisdictions. In fact, they have operated under statutory constraints (calling for "just and reasonable" rates) which, in some instances, go beyond constitutional safeguards. *E.g., Matter of New York Telephone Co. v. Public Service Comm'n*, 309 N.Y. 569, 576-578 (1956). Aside from the legal requirements for timely capital recovery, state regulators are well aware that, if they do not allow for timely capital recovery, a utility's long term financial position may be compromised. State ratepayers are the ones who will ultimately pay for this regulatory misjudgment.

Thus, the FCC's claim that preemption is needed to assure utilities' timely recovery of capital investments is a fiction. Not only does it assume that state regulators will ignore their statutory and constitutional responsibilites (which they have not done), but that state courts will suddenly offer no redress to aggrieved utilities. Neither supposition has the slightest basis in fact. Hence, no conflict exists.

2. Preemption Will Not Spur Plant Replacement Because the Level of Depreciation Charges Has, at Best, Only an Indirect Effect on System Planning

Depreciation is a mechanism used to recover investment in existing plant. Capital recovery through depreciation charges does not serve as a sinking fund for plant replacement.

In analyzing the need for new plant (or plant replacement) system planners address a wide variety of factors, including: (1) a company's overall financial health; (2) its ability to raise capital as well as its level of internally generated funds or retained earnings; (3) its estimated financing costs; (4) the cost of operating the new facility versus the cost of operating the facility to be replaced; and (5) the operational advantages of the new facility over the old.

While increased cash flow caused by higher depreciation charges could indirectly encourage plant replacement, this is only one of many factors for consideration by a utility. Moreover, state regulators unquestionably would retain the discretion to reduce utilities authorized returns on equity in recognition of their increased cash flow.[40]

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[40] The FCC's *sua sponte* attempt to increase internally generated utility funds should be contrasted with the action taken by Congress in the late 1960's to protect the government's tax base while encouraging utility plant expansion with interest free capital. Section 167(1) of the Internal Revenue Code allows telephone companies to take accelerated depreciation for tax purposes but conditions their ability to do so on regulatory agencies *not* flowing through the deferred tax benefits to the customer 26 U.S.C. § 167 (L). *Abrams v. Pub. Serv. Comm'n,* 91

In any event, the FCC cannot reasonably suggest that the states' past depreciation policies have in any way discouraged technological innovation or plant replacement. The telecommunications industry has witnessed remarkable change during its 47 years of dual regulation. The effects of these technological leaps have been reflected in the depreciation charges set by the states. The FCC's position that preemption is needed suddenly to encourage adequate plant replacement has no basis in fact. Hence, there is no frustration of federal purpose.

3. Increased Depreciation Charges Will Not Improve The Intrastate Telephone Companies' Competitive Strength

The FCC reasons that accelerated capital recovery will improve the intrastate telephone companies' ability to compete with new entrants to their markets. Its assumption is counter-intuitive because higher prices normally decrease a product's marketability.[41] The only way preemption could increase the intrastate companies' market strength would be by offering them an opportunity to accelerate their recovery of monopoly investments now, while competition is still weak, so they may reduce their future prices and drive out new entrants to their markets. This result is contrary to the FCC's policy to further competition. Dual regulation has not, and will not, frustrate the FCC's implementation of its legitimate purposes under Section 151.

Thus, theoretical and minor differences between jurisdictions, such as those alleged by the FCC in this case, do not justify preemption. *Hayfield Northern Railroad Co. v. Chicago and Northwestern Transportation Co.*, 104 S.Ct. at 2610. The decision under review should therefore be reversed.

A.D.2d 795 (3d Dept), *appeal dismissed,* 59 N.Y.2d 760 (1983). There is no such mechanism in the FCC preemption order, nor could there be.

[41] In any event, even if the FCC were correct in its supposition, the question would arise how strengthening the market control of an already dominant carrier furthers competition.

CONCLUSION

There is no basis for justifying federal preemption of state regulation of depreciation charges and accounting classifications for intrastate ratemaking. Section 152(b)(1) of the Communications Act expressly reserves the development of all intrastate depreciation charges and accounting classifications to the states. No other provision of the Act authorizes the FCC to preempt. Section 220 simply authorizes the Commission to set depreciation charges and accounting classifications for the plant assigned to interstate communication. The section does not alter the jurisdictional division of authority established by Section 152. It cannot be read to override the specific madate of Section 152(b)(1).

The express reservation of authority to the states in Section 152(b)(1) renders the FCC's "frustration" argument academic. It is, nonetheless, clear that dual regulation has not, and will not, frustrate or conflict with the FCC's implementation of its lawful purposes. The FCC simply cannot be permitted to stretch the general purpose of language of Section 151 into a Congressional invitation to override the states' traditional authority over intrastate depreciation charges and accounting classifications.

WHEREFORE, Petitioners respectfully request this Court to reverse the Order of the Court of Appeals.

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Appendix

Communications Act of 1934, as amended

47 U.S.C. § 151

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 152

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.[2]

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[1] The provisions relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

[2] The words "the Philippine Islands or" preceding "the Canal Zone" are omitted on authority of Proc. No. 2695, effective July 4, 1946, 11

(b)[3] Except as provided in section 224 and subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect control with such carrier, or (4) any carrier or which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both

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Fed. Reg. 7517, 60 Stat. 1352, recognizing the independence of the Philippine Islands.

[3] Subsection 2(b) was amended by adding the words, "Except as provided in section 224 and" at the beginning of the subsection by section 5, Public Law 95-234, approved February 21, 1978, 92 Stat. 33. The subsection was previously amended to read as above by Public Law 345, 83d Congress, 2d Session, approved April 27, 1954, 68 Stat. 63. This subsection formerly read as follows:

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

47 U.S.C. § 221

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

ACCOUNTS, RECORDS, AND MEMORANDA; DEPRECIATION CHARGES

SEC. 220. (a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or

other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance or each such offense.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided*. That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) After the commission has prescribed the forms and manner of keeping accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner of form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers or any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

USE OF JOINT BOARDS—COOPERATION WITH STATE COMMISSIONS

SEC. 410. (a) Except as provided in section 409, the Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 11 of the Administrative Procedure Act, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.